

ARTICLE VII

APPEALS, VARIANCES, INTERPRETATIONS

7-1 APPEALS

- (A) An appeal from any final order or decision of the Zoning Administrator, or an appeal arising from other ordinances regulating land use and development, may be taken to the Board of Adjustment by the city or any person who has standing under G.S. 160A-393(d). An appeal is taken by filing with the Zoning Administrator and the Board of Adjustment a written notice of appeal specifying the grounds therefor. A notice of appeal shall be considered filed with the Zoning Administrator and the Board of Adjustment when delivered to the Department of Planning and Community Development, the required filing fee paid, and the date and time of filing entered on the notice by the planning staff.
- (B) The official who made the decision shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail.
- (C) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.
- (D) In matters of appeal, it shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches high and identifying the means to contact an official for information about the decision is prominently posted on the property that is the subject of the decision, provided the sign remains on the property for at least 10 days. Posting of signs is not the only form of constructive notice. Any such posting shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the official who made the decision. Unless otherwise required by this Ordinance, posting of signs shall not be required.
- (E) Whenever an appeal is filed, the Zoning Administrator shall transmit to the Board of Adjustment all the documents and exhibits constituting the record relating to the action appealed from. The Zoning Administrator shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the applicant is not the owner.
- (F) An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the Zoning Administrator or official who made the decision certifies to the Board of Adjustment, after notice of appeal has been filed, that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the Ordinance. In that case, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court. If

enforcement proceedings are not stayed, the appellant may file with the Zoning Administrator a request for an expedited hearing of the appeal, and the Board of Adjustment shall meet to hear the appeal within 15 days after such a request is filed. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with the Ordinance shall not stay the further review of an application for permits or permissions to use such property; in these situations the appellant may request and the Board of Adjustment may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.

- (G) Subject to the provisions of subdivision (F) of this subsection, the Board of Adjustment shall hear and decide the appeal within a reasonable time.
- (H) The official who made the decision shall be present at the hearing as a witness. The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the city would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the Board of Adjustment shall continue the hearing. The Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and shall make any order, requirement, decision or determination that ought to be made. To this end, the Board of Adjustment shall have all the powers of the official who made the decision.
- (I) When hearing an appeal pursuant to G.S. 160A-400.9(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record below and the scope of review shall be as provided in G.S. 160A-393(k).
- (J) The parties to an appeal that has been made under this subsection may agree to mediation or other forms of alternative dispute resolution. The ordinance may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution.

[Section amended January 27, 2014, Text Amendment Case 02-13]

7-2 VARIANCES

7-2.1 General

- (A) An application for a variance along with the required filing fee shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator.
- (B) A variance may be granted by the Board of Adjustment if it concludes that strict enforcement of this Ordinance would result in unnecessary hardships for the applicant upon a showing of all of the following:
 - (1) Unnecessary hardship would result if the applicant complies strictly with the provisions of the Ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;
 - (2) The hardship results from conditions that relate to the applicant's land and are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from

conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance;

- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship;
 - (4) The variance will neither result in the extension of a nonconforming situation in violation of Article VI nor authorize the initiation of a nonconforming use of land; and
 - (5) The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured, and substantial justice is achieved.
- (C) No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other ordinance that regulates land use or development may provide for variances consistent with the provisions of this subsection.
- (D) A variance may be issued for an indefinite duration or for a specified duration only. Unless otherwise specified, any order or decision of the Board of Adjustment granting a variance shall expire if the applicant does not obtain a building permit or certificate of occupancy for such use within 60 days from the date of the decision or if construction of the use has not commenced within 180 days from the date of the issuance of a building permit, home occupation permit, or zoning permit.
- (E) The nature of the variance and any conditions attached to it shall be entered on the face of the home occupation permit or zoning permit, or the home occupation permit or zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information. All such conditions are enforceable in the same manner as any other applicable requirement of this Ordinance.

[Section amended January 27, 2014, Text Amendment Case 02-13]

7-2.2 Variances From Flood Hazard Overlay District Requirements

- (A) In passing upon an application for a variance from the Flood Hazard Overlay District Requirements (Section 12-2.9), the Board of Adjustment, as established by Section 3-2, shall consider all technical evaluations, all relevant factors, all standards specified in other Sections of this Ordinance, and:
- (1) the danger that materials may be swept onto other lands to the injury of others;
 - (2) the danger of life and property due to flooding or erosion damage;
 - (3) the susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;

- (4) the importance of the services provided by the proposed facility to the community;
- (5) the necessity of the facility of a waterfront location, where applicable;
- (6) the availability of alternative locations on the subject property, not subject to flooding or erosion damage, for the proposed use;
- (7) the compatibility of the proposed use with existing and anticipated development;
- (8) the relationship of the proposed use to the land development plan and floodplain management program for that area;
- (9) the safety of access to the property in times of flood for ordinary and emergency vehicles;
- (10) the expected heights, velocity, duration, rate of rise and sediment transport of the flood waters and the effects of wave action, if applicable, expected at the site; and
- (11) the costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and roads and bridges.

Upon consideration of the factors listed above and the purposes of this Ordinance, the Board of Adjustment may attach such conditions to the granting of variances as it deems necessary to further the purposes of this Ordinance. Variances are subject to review by the Federal Emergency Management Agency.

- (B) Variances shall not be issued within any designated floodway if any increase in flood levels during the base flood discharge would result.
- (C) Conditions for variances:
 - (1) Variances may not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or ordinances.
 - (2) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
 - (3) Variances shall only be issued upon (i) a showing of good and sufficient cause; (ii) a determination that failure to grant the variance would result in exceptional hardship; and (iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local law or ordinances.
 - (4) Any applicant to whom a variance is granted shall be given written notice specifying the difference between the base flood elevation and the elevation to which the structure is to be built and a written statement that the cost of

flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation. Such notification shall be maintained with a record of all variance actions.

- (5) The Zoning Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency upon request.
- (D) Variances may be issued for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places without regard to the procedures set forth in subsections (A) and (C).

7-2.3 Variances From Watershed District Overlay Requirements

- (A) **Minor Variances.** Minor variances, as defined in Section 2-4, to the provisions of Section 12-1 may be approved by the Board of Adjustment pursuant to the procedures outlined in this Article. The Zoning Administrator shall keep a record of all such minor variances and shall submit, for each calendar year, the record to the Water Quality Section, of the NC Division of Environmental Management on or before January 1st of the following year. The record shall include a description of each project receiving a variance and the reasons for granting the variance.
- (B) **Major Variances.** Major variances, as defined in Section 2-4, shall be reviewed by the Board of Adjustment pursuant to the procedures outlined in this Article and a recommendation prepared for submission to the NC Environmental Management Commission (EMC). The record of a major variance review shall include the following items:
 - (1) the variance application;
 - (2) the hearing notices;
 - (3) the evidence presented;
 - (4) motions, offers of proof, objections to evidence, and rulings on them;
 - (5) proposed findings and exceptions;
 - (6) the Board of Adjustment's recommendation, including all conditions proposed to be added to the permit.

Upon receiving the record of a major variance review from the Board of Adjustment, the EMC shall (i) review the variance request, (ii) prepare a final decision on the request, and (iii) forward its decision to the Board of Adjustment. If the EMC approves the variance as proposed, the Board of Adjustment shall prepare a final decision granting the proposed variance. If the EMC approves the variance with conditions and stipulations, the Board of Adjustment shall prepare a final decision, including such conditions and stipulations, granting the proposed variance. If the EMC denies the variance request, the Board of Adjustment shall prepare a final decision denying the variance.

7-2.4 Variances From Airport Overlay Requirements

- (A) Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use property not in compliance with the regulations prescribed in Section 12-6 may apply to the Board of Adjustment for a variance in accordance

with the provisions of Section 7-2. The application for variance shall be accompanied by a determination from the Federal Aviation Administration as to the effect of the proposal on the operation of air navigation facilities and the safe, efficient use of navigable airspace. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations will result in unnecessary hardship and relief, if granted, will not be contrary to the public interest, will not create a hazard to air navigation, will do substantial justice and will be in accordance with the spirit of this Section. Additionally, no application for a variance to the requirements of Section 12-6 may be considered by the Board of Adjustment unless a copy of this application has been furnished to the manager of the Elizabeth City-Pasquotank County Regional Airport for advice as to the aeronautical effects of the variance. If the Airport Manager does not respond to the application within thirty days after receipt, the Board of Adjustment may act on its own to grant or deny said application.

- (B) Any variance granted, if such action is deemed advisable to effectuate the purpose of Section 12-6 and be reasonable in the circumstances, may be so conditioned as to require the owner of the structure or tree in question to install, operate or maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the Board of Adjustment, this condition may be modified to require the owner to permit the Airport Authority, at its own expense, to install, operate and maintain the necessary markings and lights.

7-3 INTERPRETATIONS

- (A) The Board of Adjustment is authorized to interpret the zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such questions arise in the context of an appeal from a decision of the Zoning Administrator, they shall be handled as provided in Section 7-1.
- (B) An application for a map interpretation shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator. The application shall contain sufficient information to enable the Board of Adjustment to make the necessary interpretation.
- (C) Interpretations of the location of floodway and floodplain boundary lines may be made by the Zoning Administrator as provided in Section 12-2.8.

7-4 REQUESTS TO BE HEARD

The Board of Adjustment shall determine contested facts and decide all appeals, variance requests, and requests for interpretations within a reasonable time, consistent with the need to follow regularly established agenda procedures, provide notice in accordance with Section 7-8, and obtain the necessary information to make sound decisions.

[Section amended January 27, 2014, Text Amendment Case 02-13]

7-5 BURDEN OF PROOF IN APPEALS AND VARIANCES

- (A) When an appeal is taken to the Board of Adjustment in accordance with Section 7-1, the Zoning Administrator shall have the initial burden of presenting to the Board of Adjustment sufficient evidence and argument to justify the order or decision

appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

- (B) The burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth in Section 7-2.1(B), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

7-6 BOARD ACTION ON APPEALS AND VARIANCES

- (A) With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of facts that support the motion. If a motion to reverse or modify is not made or fails to receive the majority vote necessary for adoption, then the motion is not approved.

[Section amended January 27, 2014, Text Amendment Case 02-13]

- (B) Before granting a variance, the Board of Adjustment must take a vote and vote affirmatively (by a 4/5 majority) on the required findings stated in subsection 7-2.1(B). Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in Section 7-2.1(B) shall include a statement of the specific reasons or findings of fact supporting such motion.
- (C) A motion to deny a variance may be made on the basis that any one or more of the six criteria set forth in Section 7-2.1(B) are not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it. This motion is adopted as the Board of Adjustment's decision if supported by more than one fifth of the Board's membership (excluding vacant seats).

7-7 HEARING PROCEDURES REQUIRED ON APPEALS AND VARIANCES

- (A) Before making a decision on an appeal or an application for a variance, the Board of Adjustment shall hold a hearing on the appeal or application.
- (B) Subject to subsection (C), the hearing shall be open to the public and all persons interested in the outcome of the appeal or application shall be given an opportunity to present evidence and arguments and ask questions of persons who testify.
- (C) The Board of Adjustment may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross examination of witnesses so that the matter at issue may be heard and decided without undue delay.
- (D) The Board of Adjustment may continue the hearing until a subsequent meeting and may keep the hearing open to take additional information up to the point a final decision is made. No further notice of a continued hearing need be published.

7-8 NOTICE OF HEARING

The Zoning Administrator shall give notice of any hearing required by Section 7-7 as follows:

- (A) Notice of hearings conducted pursuant to this section shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; to any other person who makes a written request for such notice; to any other persons entitled to receive notice as provided by the zoning or unified development ordinance. In the absence of evidence to the contrary, the city may rely on the county tax listing to determine owners of property entitled to mailed notice.
- (B) Notice shall be given to neighboring property owners by mailing a written notice not later than ten days, but not more than 25 days, before the date of the hearing to those persons as described in Subsection (A) above, and who have listed for taxation real property any portion of which is located within 100 feet of the lot that is the subject of the application or appeal. Within that same time period, the City shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way.
- (C) The notice required by this Section shall state the date, time and place of the hearing, reasonably identify the property that is the subject of the application or appeal, and give a brief description of the action requested or proposed.

[Section amended January 27, 2014, Text Amendment Case 02-13]

7-9 EVIDENCE AND SUBPOENAS

- (A) The provisions of this Section apply to all hearings for which a notice is required by Section 7-7.
- (B) All persons who intend to present evidence to the Board of Adjustment, rather than arguments only, shall be sworn. Any person who, while under oath during a proceeding before the Board of Adjustment, willfully swears falsely is guilty of a Class 1 misdemeanor.
- (C) Every quasi-judicial decision (issuance or denial of the requested special use permit, appeal or variance (crucial findings)) shall be based upon competent, material, and substantial evidence in the record. Competent evidence (evidence admissible in a court of law) shall be preferred whenever reasonably available, but in no case may crucial findings be based solely upon incompetent evidence unless competent evidence is not reasonably available, the evidence in question appears to be particularly reliable, and the matter at issue is not seriously disputed.
- (D) The Board of Adjustment through the chairman, or in the chairman's absence anyone acting as chairman, may subpoena witnesses and compels the production of evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d) may make a written request to the chairman explaining why it is necessary for certain witnesses or evidence to be compelled. The chairman shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chairman shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chairman may be appealed to the full board of adjustment. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board of adjustment or the party

seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

[Section amended January 27, 2014, Text Amendment Case 02-13]

7-10 MODIFICATION OF APPLICATION AT HEARING

- (A) In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the Board of Adjustment, the applicant may agree to modify his application, including the plans and specifications submitted. Modifications made after the advertisement date must be more stringent than the original request. For example, a ten-foot variance request may be modified to an eight-foot variance request, but not to an eleven-foot variance request.
- (B) Unless such modifications are so substantial or extensive that the Board of Adjustment cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the Board of Adjustment may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted to the Zoning Administrator.

7-11 RECORD

- (A) A record shall be made of all hearings required by Section 7-7, and such record shall be kept as provided by state law. Accurate minutes shall also be kept of all such proceedings, but a transcript need not be made.
- (B) Whenever practicable, all documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings.

7-12 WRITTEN DECISION

- (A) Any decision made by the Board of Adjustment regarding an appeal or variance shall be reduced to writing, signed by the chairman and/or other duly authorized member of the Board of Adjustment.
- (B) A quasi-judicial decision is effective upon filing the written decision with the Secretary to the Board of Adjustment. Issuances of variance and/or special use permit shall be recorded with the Pasquotank County Register of Deeds. Recordation shall be the responsibility of the property owner or applicant.
- (C) The decision of the Board of Adjustment shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made.
- (D) In addition to a statement of the Board of Adjustment's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the Board of Adjustment's findings and conclusions, as well as supporting reasons or facts.

- (E) Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393. A petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with subdivision (C) of this subsection. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

[Section amended January 27, 2014, Text Amendment Case 02-13]

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